Congressional Research Service
Informing the legislative debate since 1914

Passenger Train Access to Freight Railroad Track

May 2, 2012

Congressional Research Service
https://crsreports.congress.gov
R42512

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

Pressure is building for greater passenger use of freight railroad rights of way. Freight railroad rights of way are owned by private, for-profit corporations, and the routes potentially most useful for passenger service are typically the busiest with freight traffic. In many cases, states or commuter rail authorities have reached agreement with freight railroads to share either their track or right of way. However, unlike Amtrak, which has eminent domain power over freight facilities and can appeal to a federal agency to determine the terms of its access to freight track, other would-be passenger rail operators do not have any statutory leverage when negotiating with freight railroads. This likely increases the price public authorities pay for access and leaves them with no apparent recourse when freight railroads reject their offers.

During House committee mark-up of the Passenger Rail Investment and Improvement Act of 2008 (P.L. 110-432), a provision to require binding arbitration when commuter rail authorities and freight railroads fail to reach agreement over access proved controversial. The committee chose instead to require non-binding arbitration. Some Members of Congress have urged greater reliance on private companies to provide intercity rail services similar to those offered by Amtrak, but such private services may be difficult to develop so long as potential operators lack Amtrak's statutory right to compel freight railroads to carry passenger trains. Freight railroads can be expected to object to such initiatives as unfair "takings" of their private property. In the 112th Congress, the version of surface transportation legislation passed by the Senate (S. 1813) calls for a federal study to evaluate passenger service in shared-use rail corridors and to survey processes for resolving disputes over passenger access.

Passenger access to freight railroad track raises old but recurring questions about the fundamental nature of railroad rights of way. Railroads are not like other businesses that are free to decide how and where they allocate resources solely on the principle of maximizing shareholder returns. While railroad rights of way are private property, more than a century of case law has upheld a public duty on them. The public nature of railroads is evident from the fact that they were designated as "common carriers," granted eminent domain power, and regulated by government. However, the private interest of railroads is protected by the limitation that the government's right to regulate does not mean the right to confiscate. Railroad rights of way, unlike highways, were not considered part of the "public domain." When competition from other modes eroded passenger rail travel, it was confirmed that the public duty attached to railroads could obligate them to operate some trains at a loss, provided the railroad's overall operations were profitable.

The issue for Congress is whether freight railroads and prospective passenger rail authorities should negotiate over the terms of use of railroad property just as any private parties would or if a governmental third party, such as the federal Surface Transportation Board (STB), should have some role in determining the terms. Given that a public service obligation is still attached to railroads, albeit largely lifted with respect to passenger service, do freight railroads have the right to set the price for passenger access unilaterally, or should the public's convenience and necessity be given some consideration? Granting track access rights to potential private operators of passenger service could be a particularly thorny issue. Given the increasing demands on urban rail corridors, Congress might examine alternative methods for managing them. A public "rail port authority" might have some advantages over private railroads in optimizing an urban rail network.

Contents

Contacts

Introduction

Pressure is building for passenger train use of freight railroad rights of way. Congress has provided substantial federal funding for new high-speed and intercity passenger rail services, and many state and local governments are interested in expanding both intercity and commuter routes. In most cases, such proposed services would use trackage controlled by privately owned freight railroads or build new tracks within a freight railroad's right of way.

Amtrak, the federally owned rail passenger operator, has eminent domain power over freight railroad facilities and can appeal to a federal adjudicator, the Surface Transportation Board (STB),[1] to determine the terms of its access to freight railroad track.[2] This is not the case for other current or potential passenger rail operators. Such operators, whether intercity or commuter, can use rail freight corridors only if they reach agreements with the freight railroads that own or lease the rights of way. Those agreements typically involve public funding to add track capacity and upgrade infrastructure for passenger trains, thereby facilitating freight operations as well. Changes in passenger operations, such as an increase in the number of trains or in train speeds, are likely to require additional negotiations. As passenger operators other than Amtrak have no statutory leverage when negotiating with freight railroads,[3] they have little control over the price of access and may have no recourse if freight railroads reject their proposals.

The tension between commuter and freight use of track was highlighted during mark-up of the Passenger Rail Investment and Improvement Act of 2008 (P.L. 110-432). During House committee mark-up, a provision (§401) to require binding arbitration when commuter rail authorities and freight railroads fail to reach agreement over access proved controversial. The committee chose instead to require non-binding arbitration, leaving the possibility that the public authority might be unable to implement a proposed commuter-rail project. In the 112th Congress, the Senate-passed version of surface transportation reauthorization legislation (S. 1813) calls for the U.S. Department of Transportation to evaluate the best means to enhance intercity passenger service in shared-use rail corridors and to survey processes for resolving disputes over passenger access.

If interest in passenger rail services continues to grow, Congress is likely to hear proposals to grant passenger interests greater bargaining power with freight railroads. Some commuter rail authorities and advocates of intercity passenger trains have suggested granting states or commuter authorities the same access rights Amtrak "enjoys."[4] Some Members of Congress have urged

[1] The STB, successor agency to the Interstate Commerce Commission (ICC), is bi-partisan, independent, and organizationally housed within the U.S. Department of Transportation (DOT). It has economic regulatory jurisdiction over freight railroad mergers, abandonments, new construction, and, under certain circumstances, the reasonableness of rates charged for providing rail transportation services.

[2] By statue, Amtrak must pay railroads that host Amtrak trains the incremental cost imposed, but need not contribute to the recovery of fixed costs or overhead costs.

[3] This is not to say that state or local officials would not have any political leverage when negotiating with freight railroads.

[4] This option is supported by many, but not all, commuter rail authorities. See *Commuter Rail: Information and Guidance Could Help Facilitate Commuter and Freight Rail Access Negotiations*, January 2004, GAO-04-240, p. 32. Some states pursuing high speed intercity passenger rail projects also support this option, see written testimony of John D. Porcari, Deputy Secretary, U.S. Department of Transportation, Senate Committee on Commerce, Science, and Transportation, hearing on The Federal Role in National Transportation Policy, September 15, 2010, p. 5. A bill (H.R. 2654, the TRAIN Act) that would authorize the federal Surface Transportation Board (STB) to act as an arbitrator between freight and commuter rail operators, as it does for Amtrak and freight railroads, was introduced but received

greater reliance on private companies to provide intercity rail services similar to those offered by Amtrak, but such private services may be difficult to develop so long as potential operators lack Amtrak's statutory right to compel freight railroads to allow passenger trains to use their tracks. Freight railroads can be expected to object to such initiatives as unfair "takings" of their private property.

Recent Access Negotiations

Recent examples illustrate the range of disputes that can arise in negotiations between freight and would-be passenger rail operators. Union Pacific Railroad has emphatically stated to the California High Speed Rail Authority that it has no room for proposed passenger trains on, over, or alongside its freight rights of way.[5] Even building high-speed tracks alongside its right of way, Union Pacific states, would create a barrier to any future rail-served development on that side. In upstate New York, a project for higher speed intercity service between Albany and Buffalo has been delayed by disagreement with the host freight railroad over the amount of space needed between freight and passenger tracks for safe operation, as well as disagreement over the speed the passenger trains would be allowed to operate.[6] The freight railroad's requirements would severely curtail passenger rail operations. The city of Denver at one time was contemplating building a light rail passenger line on city streets because a freight railroad objected, on safety grounds, to mixing lighter passenger rail cars with heavy freight rail cars over the same rail corridor.[7] More recently, it was announced that the city may have to substitute bus rapid transit for commuter rail service over part of a route due, in part, to higher unanticipated costs associated with acquiring a freight line.[8] City of Boston officials have been frustrated over decade-long negotiations with a freight railroad to purchase tracks to improve commuter rail service into the city.[9] The city and railroad disagreed over the appropriate methodology for valuing the right of way land. The city of Orlando just recently reached agreement with a freight railroad over the purchase price for track to be used for new commuter rail service.[10] As part of the agreement, the freight railroad is to invest the proceeds from the sale in freight facilities within Florida.

Railroads: Public Purposes but Private Property

Mandating passenger-train access to freight rights of way raises old but recurring arguments about the fundamental nature of privately owned railroads. A long line of court decisions holds that while railroads are not charities, neither are they completely like other businesses that are

---

no committee action in the 107th Congress.

[5] Letters from Union Pacific Railroad to California High-Speed Rail Authority dated May 13, 2008 and April 23, 2010. See also "High-Speed Rail Stalls; Freight Carriers Balk at Sharing Tracks With the Faster Passenger Service," *Wall Street Journal* (Online) September 21, 2010.

[6] "High-Speed Rail Money on Hold," *Albany Times Union,* August 4, 2011, p. C-1.

[7] "RTD May Take 90 Homes if Light-Rail Option Picked," *Denver Post*, October 2, 2006, p. B-5.

[8] "Transit Pitch Meets Rancor," *Denver Post,* March 6, 2012, p. A-1.

[9] "De-Railed; As Rail Business Booms, Giant CSX Has Frustrated Local Officials In Their Efforts To Acquire Tracks for Commuter Rail, Bike Trails," *Boston Globe*, October 21, 2007, p. 1. "Stalemate on Commuter Rail Tied to CSX," *Boston Globe*, March 23, 2008, p. GW-1.

[10] "CSX, Florida Close Commuter Rail Deal," *Transport Topics,* Nov. 14, 2011, p. 14.

free to operate solely for profit maximization.[11] Railroads are not free to leave the business at will or use their property for some other purpose. In other words, while railroad rights of way are private property, there is substantial case law that has infused them with a public interest or a public duty component. The remainder of this report provides historical context to the conflict between private and public interests in railroading. The arguments made over which of these competing interests should be preferred or how far one should be made subservient to the other are relevant, and inform the present policy debate.

Glossary

Common carrier—a railroad that holds itself out to the general public to transport property or passengers for compensation and must do so upon reasonable request for service.

Right of way—the strip of land on which railroad track is built. A railroad could own the strip of land as real property or it could own a mere easement which is the right/privilege to run trains over the strip of land.

Eminent domain—a right of government to take private property with just compensation for public use by virtue of its sovereignty over all lands within its jurisdiction.

Condemn—to declare property convertible to public use under the right of eminent domain.

Abandonment—a railroad terminates all service over a line. The right of way land may be sold and its clear path lost as the land is used for other purposes. Railroad regulatory jurisdiction over the line ceases as well.

Discontinuance—a railroad terminates some service over a line, like passenger service, but maintains other service over the line (such as freight).

Class I railroads—the seven large U.S. freight railroads whose networks extend over vast regions and account for about 70% of U.S. railroad mileage. Class II and III railroads are regional and shortline railroads, respectively.

Police power—the inherent power of state governments, often delegated in part to local governments, to impose upon private rights those restrictions that are reasonably related to promotion of the health, safety, morals, and general welfare of the public.

Sources: John H. Armstrong, *The Railroad-What It Is, What It Does*, 4th ed., 1998; *Barron's Law Dictionary*, 5th ed., 2003.

The first railroads in the United States were built for the purpose of moving cargo. In the 1850s, the typical railroad received only a quarter to a third of its total revenue from passenger travel. Some railroads, typically shorter lines, ran "mixed" trains carrying both passengers and freight.[12]

Commuter service was first recognized by railroads as a no-cost means of additional revenue for those intercity passenger trains whose schedules happened to coincide with rush hour traffic. Railroads offered "commuted" (reduced) fares to these passengers, recognizing that the normal fare was too high for traveling twice a day, six days per week. In the largest cities, this service became popular and railroads began operating dedicated commuter trains. Commuter trains typically operated at a loss because trips were too short and business was too concentrated at rush hours; equipment and labor were idle the rest of the day. They also lacked one source of revenue that was significant for intercity passenger trains, mail delivery. The economic return for commuter trains came from suburban residential development on land controlled directly or indirectly by the railroads. An indication of how irrelevant commuter fares were to the railroads'

[11] Paul Stephen Dempsey, "Transportation: A Legal History," *Transportation Law Journal*, v. 30, no. 2-3, Spring-Summer 2003.

[12] Carter Goodrich, *Government Promotion of American Canals and Railroads 1800-1890*, Columbia Univ. Press, New York, 1960.

investment in this service was a 1911 survey which found that some railroads had not raised fares for 15 to 30 years, and in a few instances for as long as 40 years.[13]

Typically, railroads were chartered by the states, a fact relevant to a later debate about federal versus state control. A requirement that a railroad provide passenger service was often stated in its charter, or could be stated in the state's constitution, or in state statute. In order not to compete with the Erie Canal, the charter for the Utica and Schenectady Railroad Co. forbade it from carrying anything but passengers. Other railroads chartered in upstate New York could only carry cargo in the winter when the canal was closed.[14]

Unlike other businesses, railroads were under a legal obligation to serve the public and could not discontinue operations without government approval. They were regarded as "common carriers," a concept originating in English law in the middle ages (with precursors as far back as the Roman commercial code) that invoked duties of a public nature.[15]

In their charters, the government often gave railroads eminent domain power. This authority signifies the quasi-public nature of railroads, because eminent domain powers were only granted to achieve a public purpose. An 1837 New York court ruling upholding a railroad's power of eminent domain described the dual nature of railroads. A private property owner had challenged a chartered upstate New York railroad's authority to acquire his land since the railroad would be operated for private profit. The court reasoned that the fact that the railroad was privately owned and was entitled to charge for its services did not alter the public nature of the enterprise. The court stated,[16] "Because the legislature permitted the company to remunerate itself for the expense of constructing the road, from those who should travel upon it, its private character is not established; it does not destroy the public nature of the road, or convert it from a public to a private use."

This court also supported the public nature of railroad rights of way by noting that the railroad could be prosecuted if it refused to transport a person or his property without a reasonable excuse and that the legislature had the power to regulate the prices charged by the railroad.

The Rise of Regulation

During their golden age prior to World War I, when railroads had a near-monopoly on intercity transportation, states became concerned with monopoly abuses by the railroads. Railroads, not surprisingly, challenged the authority of state governments. These cases, which eventually went to the Supreme Court, addressed the fundamental issue of whether privately owned railroad rights of way were under railroads' exclusive control or whether their character made them quasi-public institutions in which the public has an interest.[17] These cases are important to present-day concerns about public access to freight railroad rights of way because eventually they established three important principles:

- the public does have a right to some amount of control over rights of way;

[13] The Commutation Rate Case, 21 ICC 428 (1911).

[14] James W. Ely, Jr., *Railroads and American Law*, Univ. Press of Kansas, 2001, p. 7.

[15] Jurgen Basedow, "Common Carriers, Continuity and Disintegration in U.S. Transportation Law," *Transportation Law Journal*, vol. 13, 1983-1984, pp. 1-188.

[16] *Bloodgood v. The Mohawk and Hudson Railroad Co.*, 18 Wendell (N.Y.) 9, 1837 N.Y. Lexis 137.

[17] Paul Stephen Dempsey, "Transportation: A Legal History," *Transportation Law Journal*, v. 30, no. 2-3, Spring-Summer 2003, p. 299.

- this public control is vested predominantly in the federal government, not the states, because railroads are intrinsically an *inter*state means of commerce;
- this control does not give the public the right to confiscate.

Public Interest

In *Munn v. Illinois* (1876), the Supreme Court upheld a state's authority to regulate those particular categories of business whose property was "clothed with a public interest." The Court stated,[18] "When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use."

The Court also reasoned that common carriers are held to "exercise a sort of public office, and have public duties to perform."

Two judges dissenting in this case foreshadowed an argument that held sway in the next century when passenger trains became unprofitable and railroads petitioned to discontinue them. The dissenting judges argued that almost all private businesses could be considered as having an element of public interest and that for the legislature to regulate their prices was a taking of private property without due process. If a property owner "is compelled to take as compensation for its use less than the expenses to which he is subjected by its ownership, he is, for all practical purposes, deprived of the property, as effectually as if the legislature had ordered his forcible dispossession."[19]

Federal versus State Control

A decade later, the Supreme Court essentially overturned *Munn v. Illinois*, necessitating establishment of a federal role in regulating railroad rates and service. In *Wabash, St. Louis and Pacific Railway Company v. Illinois* (1886),[20] a railroad challenged the authority of the Illinois state railroad commission to regulate the Illinois portion of a rate for shipments between points within Illinois and New York. The Court reasoned that this regulation by the state affected interstate commerce, which only the federal government had authority to regulate. The Court focused on the onerous conditions that would be imposed on railroads if each state provided rules applicable to its own passengers and freight regardless of the interests of others.

In response to the *Wabash* ruling, Congress created the Interstate Commerce Commission (ICC) in 1887, modeling it after state railroad commissions.[21] (Numerous bills related to railroad regulation had been introduced in Congress since 1868.) In the ICC Act, Congress impressed the common carrier concept upon both freight and passenger railroad service: "the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad" and further stated that "Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities ... for the receiving, forwarding and delivering of passengers and property."

[18] *Munn v. Illinois*, 94 U.S. 113 (1876). Although this case did not directly involve railroads (Munn was a grain elevator company), subsequent cases applied this principle to railroads.

[19] *Munn v. Illinois*, 94 U.S. 143 (1876).

[20] 118 U.S. 557 (1886).

[21] Act to Regulate Commerce, Ch. 104, 24 Stat. 379 (1887).

Limits to Government Power

In 1890, the Supreme Court limited governments' power to regulate railroad rates, holding that rates cannot be made so unreasonably low as to deprive the railroad company of any chance of profit; the right to regulate, the court held, was not the right to confiscate.[22] State legislators or regulators had tended to set low rates on local traffic, which had the effect of shifting the cost of providing railroad service to interstate shippers, undermining the national interest in a viable national railroad network.[23] Subsequent court cases strengthened the ICC while narrowing the scope of state authority. A 1914 Supreme Court ruling upheld the ICC's authority over *intra*state rates that were found to be injurious to *inter*state commerce.[24] There was also a practical limit to state governments' imposition of unremunerative rates, as some railroad companies closed down their operations to avoid being forced to "pour their money into a hole in the ground."[25]

In 1906, under the Hepburn Act,[26] Congress granted the ICC additional powers, and placed certain railroad activities that may have been contracted out, such as express and sleeping car services, under the common carrier umbrella. The law further stated, "it shall be the duty of every carrier subject to the provisions of the Act to provide and furnish such transportation upon reasonable request."

Local Passenger Station Stoppage Laws

One of the requirements for profitable railroad operation is traffic density. Railroads can achieve better economies by limiting stops to locations that offer a substantial customer base. Consequently, access to railroad rights of way by smaller communities, smaller shippers, and/or those seeking travel for relatively short distances has been a long-standing issue. These customers have relied on legal principles of "fairness" to gain access to the railroad network.

At the turn of the last century, the Supreme Court, in a series of cases, held that railroads were obligated to provide local service as long as this requirement was enforced in such a way that it did not impede interstate commerce.[27] For instance, the Supreme Court struck down an Illinois law that required all passenger trains to stop at every county seat.[28] The Court pronounced this an unconstitutional hindrance of commerce because the trains were also providing express mail delivery. A 1907 Missouri law requiring that all passenger trains stop at junction points with other railroads was struck down on similar grounds.[29]

[22] *Chicago, Milwaukee and St. Paul Railway v. Minnesota*, 134 U.S. 418 (1890).

[23] James W. Ely, Jr. "The Railroad Question Revisited: Chicago, Milwaukee and St. Paul Railway v. Minnesota and Constitutional Limits on State Regulations," *Great Plains Quarterly,* Spring 1992, pp. 121-134.

[24] *Houston, East and West Texas Railway Co. v. United States*, 234 U.S. 342 (1914).

[25] William E. Thoms, "Regulation of Passenger Train Discontinuances," *Journal of Public Law*, v. 22, 1973, p. 105.

[26] 34 Stat. 584.

[27] The cases cited in this section draw heavily upon those discussed in James W. Ely, Jr., "The Railroad System Has Burst Through State Limits: Railroads and Interstate Commerce, 1830-1920," *Arkansas Law Review,* v. 55, 2002-2003, pp. 933-980.

[28] 163 U.S. 142 (1896).

[29] 218 U.S. 135 (1910).

On the other hand, the Supreme Court upheld a Minnesota stoppage law because it distinguished between local passenger trains and interstate through trains.[30] *Gladstone v. Minnesota* involved passenger train service between St. Paul and Duluth. The Minnesota law required *intra*state passenger trains to stop at every county seat on their course but expressly exempted the *inter*state through trains from this requirement. In upholding this law the Court referred to a state's "police power" as the basis for a state's authority to regulate intrastate trains.

One notable ruling on the obligations of railroads to provide local passenger service to less densely populated communities came in 1899, when a sharply divided Supreme Court upheld an Ohio law requiring railroads to stop at least three passenger trains daily (travelling in each direction) at villages with more than 3,000 inhabitants.[31] The Court found that this was not an unreasonable burden on interstate trains because the railroads were free to schedule other trains on an express basis. The majority held that a state's police power, in addition to providing for the public health, public morals, and public safety of its citizens, also included providing for "public convenience":[32]

> [The state of Ohio] was not compelled to look only to the convenience of those who desired to pass through the State without stopping. Any other view of the relations between the State and the corporation created by it [the railroad] would mean that the Directors of the corporation could manage its affairs solely with reference to the interests of stockholders and without taking into consideration the interests of the general public. It would mean not only that such directors were the exclusive judges of the manner in which the corporation should discharge the duties imposed upon it in the interest of the public, but that the corporation could so regulate the running of its interstate trains as to build up cities and towns at the ends of its line or at favored points, and by that means destroy or retard the growth and prosperity of those at intervening points.

Police power remains an important issue in the debate about the extent of local control over railroad operations. Over the past century, Congress has reduced but not eliminated the ability of state or local governments to control railroads operating in their jurisdictions, and the distinction between a reasonable exercise of local police power and an unreasonable interference with commerce continues to be contentious.[33]

Balancing the Needs of Travelers and Shippers

One of the policy questions associated with granting states or localities a right to access railroad rights of way is whether they would give due consideration to both freight and passenger interests. Since freight does not vote, one might speculate that passenger interests would inevitably be favored. On the other hand, cities (especially port cities) recognize that convenient rail connections are important for attracting commerce.

In the current era, freight railroads have been moving many of their urban intermodal yards to the suburbs or exurbs, where they can have sufficient space for container storage and avoid the expense of constructing overhead clearances through the urban core for taller double-stack

[30] *Gladstone v. Minnesota*, 166 U.S. 427 (1897).

[31] *Lake Shore & Michigan Southern Railway Co. v. Ohio*, 173 U.S. 285 (1899).

[32] 173 U.S. 285 (1899); 1899 U.S. LEXIS 1438, p. 9.

[33] For examples of conflicts over this distinction today, see Maureen E. Eldredge, "Who's Driving the Train? Railroad Regulation and Local Control," *University of Colorado Law Review*, v. 75, Spring 2004, pp. 549-595.

container trains.[34] This shift can free up track for passenger use. In Boston, a city with a strong passenger rail tradition, CSX railroad has sold most of its rights of way to the Massachusetts Bay Transportation Authority for commuter-train operations, but container cargo must now be trucked over 40 miles between the port and the CSX terminal in Worcester, MA.[35] In Chicago, where both freight and passenger rail have strong traditions, a major project is underway to build overpasses or underpasses to better accommodate freight trains through the city, reducing conflicts at numerous grade-crossings.[36] One of the motivations for this project is to prevent additional freight yards (and rail jobs) from moving to the exurbs.[37] These examples indicate that different states and cities might balance passenger and shipper interests differently.

The Supreme Court Justices in the 1899 Ohio stoppage law case disagreed whether local governments could adequately balance the needs of both passengers and shippers. Justices in the majority argued that local governments could manage the rights of way in their jurisdiction more wisely than a distant federal authority. Justices in the minority argued that local governments would discount the needs of national commerce. The majority opinion cited as precedent an 1882 case that involved balancing the needs of passengers and shippers in Chicago.[38] A city ordinance had prescribed that drawbridges over the Chicago River not be opened during rush hours and not be opened for more than 10 minutes at a time during the rest of the day (Sundays excepted). A barge carrier sued. The Supreme Court upheld the Chicago ordinance as "just and reasonable." But in a ruling that would be widely cited, it also made clear that the city's control over the bridges was not absolute:

> Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce. And nowhere could the power to control the bridges in that city, their construction, form, and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the city upon whom it has devolved that duty. When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the State and that of the Federal government come in conflict, the latter must control and the former yield.

The four Justices dissenting in the Ohio stoppage law case argued that the Ohio law discriminated against national interests in favor of local interests. The dissenting Justices quoted at length from the *Wabash v. Illinois* decision, arguing that the regulation of commerce must of necessity be of a national, not local, character. The dissenting judges argued,

> It is fallacious ... to contend that the Ohio legislation in question was enacted to promote the public interest. That can only mean the public interest of the State of Ohio, and the reason why such legislation is pernicious and unsafe is because it is based upon a discrimination in favor of local interests, and is hostile to the larger public interest and convenience involved in interstate commerce. Practically there may be no real or considerable conflict between the public interest that is local and that which is general. But, as the state legislatures are controlled by those who represent local demands, their action

[34] Raising overhead clearances can also improve the efficiency of passenger trains by allowing for double-deck cars.

[35] See Massachusetts Dept. of Transportation—Acquisition Exemption—Certain Assets of CSX Transportation, STB Docket No. FD35312, May 3, 2010 and the discussion under "Public Authorities Avoid Acquiring Common Carrier Status."

[36] See http://www.createprogram.org/.

[37] See http://www.edrgroup.com/library/freight/rail-freight-futures-for-the-city-of-chicago.html.

[38] *Escanaba Co. v. Chicago,* 107 U.S. 678 (1882).

> frequently results in measures detrimental to the interests of the greater public, and hence it is that the people of the United States have, by their constitution and the acts of Congress, removed the control and regulation of interstate commerce from the state legislatures.

In another case, the Supreme Court recognized the competitive environment among railroads on intercity routes, and judged as unfair a local stoppage law that would hinder one railroad from competing with its rivals.[39] Magnolia, MS, had petitioned to have intercity passenger trains traveling between New Orleans and Chicago stop in the town. The Court struck down this stoppage law, stating,[40]

> Competition between great trunk lines is fierce and at times bitter. Each line must do its best even to obtain its fair share of the transportation between States, both of passengers and freight. A wholly unnecessary, even though a small, obstacle ought not, in fairness, to be placed in the way of an interstate road, which may thus be unable to meet the competition of its rivals.

The ruling in the Mississippi case remains relevant today because most large cities have at least two trunk line (Class I) railroads in direct competition. Thus, if a state or municipality were to require one of the railroads to accommodate commuter or intercity passenger trains in its right of way, that requirement could affect the competitive situation between the two rivals.

Local station stoppage laws at the turn of the last century point to the conflict between interstate and local users of a railroad network that was rapidly becoming national in scope. Perhaps for this reason, an entirely separate railroad network was constructed to serve local travelers. Between 1890 and World War I, more than 18,000 miles of interurban electric railroads were built, mostly with a different gage than steam track to preclude access by freight trains. Interurban trains typically consisted of just one or two passenger cars making frequent stops. By 1933, more than half of this network had already been abandoned due to auto and bus travel.

The *raison d'être* of the interurban electric network raises a fundamental question: can today's railroad network, North American in scope, adequately serve both local and long-distance users? Even shortline freight railroads, typically hauling small amounts of cargo for short distances, complain today about difficulty accessing the transcontinental network.[41] The Class I (transcontinental) freight railroads can better exploit their comparative advantage over other modes by moving entire train loads of the same cargo from one origin to one destination, rather than stopping to pick up or drop off single-carload shipments along the way.[42] Use of their track for local purposes might therefore interfere with the Class I railroads' business strategies.

Condemning Railroad Property for Other Public Uses

Although railroads were delegated eminent domain power because they would be providing a public good, a series of cases also established that railroad property can be condemned for the purpose of providing a second public good. These cases describe the circumstances under which passenger operators might possibly condemn portions of railroad rights of way. In many situations, freight railroads are not using the entire widths of their rights of way, having taken

[39] 203 U.S. 335 (1906).

[40] 203 U.S. 335, 346.

[41] See Testimony of Richard F. Timmons, President of the American Short Line and Regional Railroad Association, STB Ex Parte No. 677, Hearing on the Common Carrier Obligation, April 25, 2008.

[42] Since 1920, the average length of haul for a rail freight shipment has increased from 327 miles to over 900 miles. Association of American Railroads, *Railroad Facts*, 2009 edition.

advantage of advances in signal technology and other efficiencies to run single-track rather than double-track operations. For example, outside the Northeast Corridor, 70% of the freight-owned mileage over which Amtrak operates is single tracked. In addition, 6 of Amtrak's 12 shorter-distance corridor routes operate on rights of way that are at least 70% single tracked.[43] The following cases suggest that demands to take unused land within railroad rights of way for passenger service might be subject to different legal standards than demands for use of existing track.

Cases involving telegraph lines strung along railroad rights of way established important precedents. The technologies were symbiotic in that the railroads used the telegraph to communicate train locations, and they were usually willing to allow telegraph companies to erect poles alongside tracks in exchange for providing free telegraph service to the railroad. Disagreements did arise, however, typically when more than one telegraph company sought to string wires on a railroad's right of way. Telegraph cases were cited in later cases allowing a second railroad to condemn certain property of an existing railroad in order to lay its own track alongside, even though the two railroads would be competing with one another.

One telegraph case established an important caveat to the rule that the public has an interest in railroad rights of way. Upon expiration of a contract agreement between a railroad and a telegraph company, the railroad decided to contract with a competing telegraph firm and to eject the incumbent telegraph company from the right of way, disposing of its poles and wires.[44] The incumbent company argued that railroads were public highways and hence subject to occupation under an 1866 statute that gave telegraph companies the right to the "public domain."[45] The Supreme Court disagreed, stating, "A railroad's right of way is property devoted to a public use and has often been called a highway, and as such is subject, to a certain extent, to state and Federal control but it is so far private property as to be entitled to the protection of the Constitution so that it can only be taken under the power of eminent domain ... or with the consent of the railroad."

A second telegraph precedent relevant to passenger access to freight track turned on whether use of the right of way would interfere with the railroad's operations.[46] The Illinois Supreme Court ruled that a railroad wishing to start its own telegraph service could not prevent the incumbent telegraph company from condemning its right of way and maintaining its poles and wires on railroad property, because stringing an additional wire between the existing telegraph poles would cause no additional interference with the railroad's operations.

The principle of no material interference established in the telegraph cases was also applied to unused, unimportant, or superfluous railroad property. During the boom years of railroad construction at the turn of the last century, available rights of way were lacking for subsequent railroads in some built-up areas. These railroads sought to condemn portions of existing rights of way. Citing the telegraph cases, the North Carolina Supreme Court allowed a competing railroad serving Charlotte to condemn a portion of another railroad's right of way for a few hundred feet through the city.[47] A similar ruling was issued regarding two railroads in Danbury, CT, where the

[43] DOT IG, *Root Causes of Amtrak Train Delays,* September 8, 2008, report no. CR-2008-076, p. 15. See also, Jeremy Grant, "Ageing U.S. Rail Networks Stuck in a One-Track World," *Financial Times,* September 13, 2004.

[44] *Western Union Telegraph Co. v. Pennsylvania Railroad Co. et al.,* 195 U.S. 540 (1904).

[45] The Act of Congress of July 24, 1866 (14 Stat. 221).

[46] *The Western Union Telegraph Co. of Illinois v. The Louisville and Nashville Railroad Co.,* 270 Ill. 399 (1915).

[47] *North Carolina and Richmond and Danville Railroad Co. v. Carolina Central Railway Co. and others.,* 83 N.C. 489 (1880).

owning railroad had graded right of way wide enough for two parallel tracks but had only laid one track.[48] Because this land was not being used, the court allowed it to be condemned by another railroad. The court noted the public's interest in having tracks not take up more land than necessary, as well as the economy of two railroads sharing the cost of maintaining a roadbed.

In Washington State, a railroad was able to condemn 28 feet of an existing railroad's 100-foot-wide right of way for a distance of several hundred feet because the owning railroad was not making use of a portion of its right of way.[49] The state court cited a provision in the state's property law authorizing condemnation not only of roadbed but also of track, implying that in certain circumstances two railroads could be required to operate trains over the same track. The two rail carriers would share a common easement over the track.

Abandonments, Discontinuances, Profitability: Does It Provide a Basis for Passenger Access to Freight Tracks?

If the Surface Transportation Board were to be empowered as an arbitrator for passenger access to freight facilities, a related question is how the board could balance the needs of the competing interests. How could the public's need for passenger service be measured? Must it be vital or merely convenient? Could a freight railroad be forced to forego some amount of freight revenue in order to make room for passenger trains? If so, how much forgone revenue is tolerable? Should a prosperous railroad be required to forego more revenue than a financially weak railroad? The Interstate Commerce Commission, the STB, and the courts have usually addressed these questions in the context of permitting railroads to discontinue a service, but their responses may shed light on how the railroads' public service obligations might be weighed in the face of demands for an additional service.

After World War I, passenger rail service went through a period of contraction followed by stagnation. Intercity bus and automobile travel began to attract passengers away from trains. The Great Depression made matters much worse; many major railroads entered bankruptcy. An ICC study conducted in the late 1950s cited 1930 as the first year that the industry ran an operating deficit from passenger service.[50] This deficit increased year after year, except during World War II.

Beginning with the Transportation Act of 1920 (P.L. 66-152, 41 Stat. 456), which returned the railroads to the private sector after nationalization during World War I, Congress demonstrated increasing concern with the financial health of the carriers. Congress recognized that the system was too large in scope and operated by too many carriers for optimal performance on a national scale. The 1920 act included a number of provisions aimed at consolidating the nation's railroads. One of these provisions allowed the railroads to petition the ICC to abandon unprofitable lines. Prior to the 1920 act, states had been an obstacle to abandonment, often requiring railroads to continue providing local services at a loss. The terms by which the ICC was to evaluate

[48] *The New York Housatonic & Northern Railroad Co. v. The Boston, Hartford, and Erie Railroad Co.*, 36 Conn. 196 (1869).

[49] *Seattle and Montana Railroad Co. v. Bellingham Bay and Eastern Railroad Co.*, 29 Wash. 491 (1902).

[50] ICC, *Railroad Passenger Train Deficit*, 306 ICC 417 (1959).

abandonments became the basis for it to evaluate proposed passenger service discontinuances after World War II: the law required the ICC to weigh "public convenience and necessity" and the financial health of the railroad. Between 1920 and 1963, the ICC permitted the abandonment of nearly 50,000 miles of railroad, approximately one-fifth of the total mileage that existed in 1920.[51] It is not known how much of this mileage, if the right of way was still clear, would be useful today for passenger service.

The Transportation Act of 1920 addressed only total abandonment of a line, and did not give the ICC authority to regulate railroads' attempts to discontinue just the passenger trains over a line while continuing freight train service. This shortcoming was highlighted by a case in which a railroad appealed to the Wisconsin Public Service Commission to cancel passenger train service on a 27-mile line only during the winter months due to light traffic. The Wisconsin commission refused, and later denied the railroad's petition to replace rail service with bus service during the winter months. The railroad then filed an abandonment petition with the ICC. The ICC allowed the abandonment, which meant the discontinuance of freight service and summer passenger service as well.[52] Thus, federal authority over abandonments had an "all or nothing" aspect to it.

In the Transportation Act of 1958 (P.L. 85-625, 72 Stat. 571), Congress granted the ICC authority to allow a railroad to discontinue passenger service over a line while continuing freight service.[53] For *intra*state passenger service, a railroad was required to first petition its state government. If the state prohibited discontinuance, the railroad could then appeal to the ICC. For *inter*state passenger routes, a railroad could discontinue the service but it would be subject to a stay by the ICC.[54] The ICC had four months to decide if it should stay (delay) the service discontinuance, which it could only do for one year.

One passenger train discontinuance case reached the Supreme Court in 1964.[55] The Southern Railway sought to discontinue the last two passenger trains between Greensboro and Goldsboro, NC. The ICC granted the discontinuance on the grounds that the cost of providing the passenger service was three times the revenue it produced and that the need for the service was insubstantial. The federal district court overturned the ICC ruling,[56] but the Supreme Court, with two Justices dissenting, reinstated it. The Supreme Court majority opinion held that where the demands of public convenience and necessity are slight, as in this case, it was proper for the ICC in determining the existence of a burden on interstate commerce to give little weight to the carrier's overall prosperity. In its argument, the majority also referred to the opposite situation, citing the example of unprofitable commuter trains. The majority stated that in cases involving "vital commuter services in large metropolitan areas where the demands of public convenience and necessity are large, it is of course obvious that the Commission would err if it did not give great weight to the ability of the carrier to absorb even large deficits resulting from such services."

[51] Steven R. Wild, "A History of Railroad Abandonments," *Transportation Law Journal*, v. 23, 1995-1996.

[52] 295 ICC 157, 1956.

[53] The 1958 Act provision regarding passenger service discontinuance may have been prompted specifically by the New York Central Railroad, which wished to discontinue passenger ferry service across the Hudson River but not its freight ferry service (see 372 U.S. 1, 5-6).

[54] This arrangement was a result of a compromise between the Senate version, which would have allowed a railroad to petition the ICC directly for both intra- and interstate services, and the House version which would not have given the ICC any jurisdiction over intrastate service, limiting its authority to interstate service.

[55] *Southern Railway Co. v. North Carolina et al.*, 376 U.S. 93 (1964).

[56] 210 F. Supp. 675.

The two dissenting Justices asserted that if railroads were allowed to terminate service based solely on the availability of alternate modes of transportation and a finding of a "net loss" on the service, railroads would discontinue virtually all of their commuter trains. The dissenters cited a 1958 Supreme Court case that upheld the principle that a railroad that was prosperous overall could be required to provide particular services at a loss.[57] The 1958 case involved the Chicago, Milwaukee, St. Paul & Pacific Railroad, which appealed to the Illinois Commerce Commission to raise commuter fares so as to avoid a yearly loss of over $300,000. The Illinois commission denied the fare raise. The railroad appealed to the ICC, which granted enough of a fare increase for the railroad to break even on the commuter service. However, the Supreme Court ruled against the ICC and in favor of the Illinois commission, criticizing the ICC for not giving due consideration to the overall profitability of the railroad's operations in Illinois.

The 1958 and 1964 Supreme Court cases suggest that where passenger service is deemed vital, a profitable railroad could in some circumstances be required to provide such service even at a loss. These precedents raise an important question regarding the terms of passenger access to freight track in the present day. Can a freight railroad be required to provide passenger operators access to its facilities at less than what it perceives as the full market value?

When Congress directed the ICC to balance public convenience and necessity with the burden on interstate commerce in considering railroads' requests to abandon track or discontinue passenger service, it did not indicate how heavy a burden was acceptable. The ICC generally equated "public convenience and necessity" with passenger interests. However, in a 1965 case that allowed the Boston and Main Railroad to discontinue two passenger trains, the ICC defined the public interest to include the shipping customers of the railroad. The ICC concluded that in order to preserve the railroad for freight customers, passenger service must be permitted to end.[58]

Government Takeover of Passenger Service

The stakes became higher as the railroad industry's financial situation deteriorated in the 1960s. Railroads began approaching the ICC with wholesale requests to discontinue all of their passenger trains. For instance, in 1966 the trustees running the New York, New Haven, and Hartford Railroad filed to discontinue all of the railroad's 278 interstate passenger trains, including commuter trains for New York, Boston, and Providence, as well as intercity trains. These trains made 1,244 trips in a typical week and carried 76 million passengers in 1964.[59] This railroad's passenger service was deemed as important, if not more so, than its freight service. The ICC blocked the discontinuance of all but a few of the passenger trains.[60]

In 1970, Penn Central petitioned the ICC to discontinue 34 passenger trains, including all of the railroad's east-west intercity passenger service west of Buffalo, NY, and Harrisburg, PA. This petition, which would have ended passenger rail service between New York and Chicago, gave momentum to legislation creating a national passenger railroad corporation.

The discontinuance of privately provided commuter train service led to public ownership of these services. The Long Island Railroad, while the busiest commuter railroad in the country,

[57] *Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. Illinois et al.,* 355 U.S. 300 (1958).

[58] 324 ICC 705 (1965), 324 ICC 418 (1965).

[59] Robert L. Bard, "The Challenge of Rail Passenger Service: Free Enterprise, Regulation, and Subsidy," *Univ. of Chicago Law Review*, vol. 34, 1966-1967, pp. 301-340.

[60] Even the trustees were probably not surprised by this decision. They were attempting to rid the railroad of its passenger obligations in the hopes of becoming more attractive for purchase by a merged Pennsylvania and New York Central Railroad.

nevertheless did not have sufficient freight traffic to cover its losses on passenger service. It was the first commuter line to fall into public ownership, in 1966.

Discontinuance of service also led to federal subsidization of commuter operations. The mayors of large cities with commuter operations were alarmed when railroads proposed their discontinuance and sought assistance from the federal government. Federal assistance began in the early 1960s and included assistance to private entities, but under the Urban Mass Transportation Act of 1964, federal funding for transit could only be granted to public entities, thus encouraging the public takeover of privately owned commuter services. For example, the Massachusetts Bay Transportation Authority was formed in 1964 to subsidize commuter lines, finally purchasing many lines from the railroads in the 1970s. The city of Philadelphia began subsidizing commuter service in 1958 and, with cooperation from surrounding counties, formed a regional authority in the 1960s to consolidate governance of commuter operations. New Jersey began subsidizing commuter trains in 1964, began buying new rolling stock for private operators in 1968, and eventually created New Jersey Transit in 1982.

The Creation of Rights for Passenger Train Access

The petition of the Penn Central Railroad to discontinue intercity passenger service in the Northeast and Midwest gave momentum to passage of the Rail Passenger Service Act of 1970 (P.L. 91-518), the law that created Amtrak. Amtrak was established as a mixed corporation; it was set up as a private corporation but all its common stock was owned by U.S. taxpayers and its preferred stock would be owned by participating railroads. Amtrak was to take over intercity (but not commuter) passenger service from those railroads choosing to turn the service over to Amtrak. Each railroad was required to pay Amtrak an amount based on the railroad's losses from passenger service in 1969. If Amtrak was not able to reach an agreement with a railroad for use of its tracks or other facilities, the ICC was authorized to order the railroad to make its assets available to Amtrak and to set just and reasonable terms and compensation for their use.[61]

In 1973, Congress amended the 1970 act to augment Amtrak's bargaining power with the freight railroads. It required freight railroads to give "preference" to Amtrak trains operating on their track (i.e., they are supposed to be given priority over freight trains when dispatching trains), authorized Amtrak to buy rights of way and stations or acquire them by eminent domain, set Amtrak's compensation to freight railroads for use of their track at incremental costs (thus not contributing to fixed and overhead costs), and allowed Amtrak to appeal to the U.S. Department of Transportation in the event that a freight railroad refused to allow higher-speed trains on its track.[62] Since passage of the 1970 amendments, freight railroads have contended they subsidize Amtrak service because Amtrak pays only the freight railroads' additional cost of running Amtrak trains without contributing to fixed and overhead costs. Thus, some freight railroads continue to have a form of passenger service obligation by carrying Amtrak trains at what they view as a subsidized price.

The shrinkage of the rail network in the 1970s and 1980s provided, at least potentially, opportunities to use abandoned freight lines for passenger service, facilitated by important statutory and regulatory changes to the abandonment process discussed below. In 1972, the ICC attempted to simplify the abandonment process by adopting a rule that, with a rebuttable presumption, it would probably grant an automatic abandonment (without a hearing) if a line

[61] P.L. 91-518, Section 402.

[62] P.L. 93-146, November 3, 1973, 87 Stat. 548.

annually averaged less than 34 cars per mile.[63] Between 1970 and 1976, 15,000 miles of railroads were abandoned.[64]

Access via the "Forced-Sale" Provision

In 1980, with passage of the Staggers Act (P.L. 96-448), Congress required that, if a responsible party came forward offering to buy or subsidize a line slated for abandonment, the line could not be abandoned and the ICC would set the terms and the conditions for purchase of the line. This so-called "forced sale" provision proved very useful for would-be passenger operators, particularly local authorities seeking to provide commuter rail or mass transit service, as a freight railroad was more likely to be flexible in bargaining knowing that if there were no agreement on a sale price, the ICC would set the price and terms of sale.[65]

The "forced-sale" provision was used in 1981 by a commuter agency in the Chicago suburbs to acquire a 17-mile section of track that the Chicago and North Western (C&NW) Railroad had slated for abandonment. The price set by the ICC was much closer to the offer made by the commuter agency than the offer made by the C&NW Railroad.[66] This illustrates why many commuter operators favor having Amtrak-like legal powers to negotiate access to freight railroads, as those powers reduce freight railroads' leverage in bargaining.

Access via "Adverse Abandonment"

Another important ICC case from the same period established the precedent of "adverse abandonment." If another entity, such as a passenger rail authority or shipper group, wishes to restore rail service over a dormant rail line that the owning railroad is not planning to abandon, that party could appeal to the ICC to force abandonment by the owning railroad. This precedent was set by a Kansas City-area transit authority that sought to use a fallow rail corridor.[67] The transit authority first tried to condemn the property, but the court disallowed the condemnation because the ICC had not issued an abandonment certificate, meaning that the line was still part of the national rail network and under the ICC's jurisdiction, preempting the condemnation proceeding. The transit authority then petitioned the ICC to issue an abandonment certificate over the owning railroad's objection. The ICC did so because the owning railroad had not provided rail service nor conducted any maintenance work on the line in over a decade and was making no efforts to solicit customers on the line.

Rail-Banking

Congress's concern with the extent of abandonments led to passage in 1983 of amendments to the National Trails System Act (P.L. 98-11). These amendments allowed railroad rights of way to be preserved for interim recreational trail use or for telecommunication facilities, retaining a

[63] ICC Annual Report, FY 1972. Several states sued to suspend this rule but the rule was upheld, 361 F. Supp. 208.

[64] U.S. DOT, *Availability and Use of Abandoned Railroad Rights-Of-Way*, June 1977.

[65] See *Chicago and North Western Transp. Co. v. United States*, 582 F.2d 1043, 1049 (7th Cir. 1978).

[66] See Elizabeth Burch Michel, "Casenote: Chicago and North Western Transportation Co. v. United States," *Transportation Law Journal*, v. 13, 1984, p. 245.

[67] Michael L. Stokes, "Adverse Abandonment: Toward Allowing the States to Condemn or Dispose of Unneeded Railroad Land," *Transportation Law Journal*, v. 31, Fall 2003, p. 69.

railroad's right to reactivate a rail line if future needs dictated. Congress had expressed this intent also in the 1976 4-R Act (§809 of P.L. 94-210), but the language in that act had failed to produce the desired result. The process in the 4-R Act had included as an initial step before rail-banking that the line in question be officially granted an abandonment certificate. Upon this designation, however, abutting property owners claimed rights of ownership to the right of way land.[68]

Amtrak Uses Its Eminent Domain Power

In 1987, Amtrak discontinued its service to Montreal because a 49-mile section of track between Brattleboro and Windsor, VT, was not adequately maintained by the owning railroad. Amtrak believed a 1977 contract entitled it to operate its trains at 60 miles per hour, but the track condition only satisfied the host freight railroad's need for 25 mile-per-hour train speeds. When negotiations broke down, Amtrak turned to the nearby competitor of the host shortline railroad. The competitor and Amtrak entered into an agreement in which Amtrak would use its eminent domain power to acquire the segment of track (via an application to the ICC). Amtrak would immediately sell the track to the competitor, and would pay the competitor an agreed-upon price for track maintenance.

In a series of decisions, the ICC approved the condemnation, after which Amtrak and the competitor executed their agreements, the track was upgraded, and Amtrak resumed its service to Montreal in July 1989. The ICC chairman dissented from the majority decision, stating that it would be "hard to imagine a more blatant misuse of the public's eminent domain power," and also argued that neither Amtrak nor the ICC had the power to restructure the competitive relationship between the two shortlines.[69] The U.S. Court of Appeals for the D.C. Circuit overturned the ICC decision,[70] holding that Amtrak did not have authority to condemn property for the purpose of selling it to another railroad. Congress then amended the statute specifically to authorize this type of condemnation. The D.C. Circuit denied a rehearing,[71] but its original decision was reversed by the Supreme Court.[72] This is the only case in which Amtrak has resorted to its eminent domain power when dealing with what it perceives to be an intransigent freight railroad.

Running passenger trains on a host freight railroad track inevitably involves cooperation on a daily basis. Negotiations are not over once the terms of access are agreed upon. Intervention by a federal regulator—responsibility for Amtrak's access to freight track now rests with the Surface Transportation Board—might poison the relationship between passenger operator and host railroad, inhibiting the cooperation necessary to provide good service. Indeed, several years later Amtrak faced resistance from the parent company of the same railroad in trying to increase speeds on a 78-mile section of track between Portland, ME, and Plaistow, NH, for its "Downeaster" service to Boston.[73] Some commuter authorities have not sought government

[68] See *Preseault v. ICC*, 494 U.S. 1 (1989).

[69] 4 ICC 2d 761 (1988).

[70] 911 F.2d 743 (D.C. Cir. 1990).

[71] The Independent Safety Board Act Amendments of 1990 (P.L. 101-641).

[72] 503 U.S. 407 (1992).

[73] "The Guilford Dilemma," *Maine Times*, March 15, 2001, p.4.

intervention in disputes out of concern that this would complicate future relations with host railroads.[74]

The Common Carrier Obligation Fades

When it passed the Staggers Act of 1980 to deregulate the rail industry, Congress maintained railroads' common carrier obligation. The act allowed railroads and shippers, for the first time, to enter into confidential contracts with one another, but it specified that these contracts could not impair a railroad's ability to meet its common carrier obligations. However, the overall thrust of the Staggers Act was to allow railroads more leeway to make decisions based on their economic interests. An important development indicating the extent to which railroads are now able to act like any other business is the treatment of opportunity costs.

Opportunity cost is the economic loss experienced by a carrier from foregoing a more profitable alternative use of its assets. In terms of potentially tipping the scale between private and public interests in railroads, opportunity cost is a weighty matter. The ICC struggled with whether it was appropriate to consider opportunity costs in rail line abandonment proceedings, and amended its balancing test in 1980 to allow a railroad to abandon a line if it could show that the resources tied up in owning and maintaining it could earn a higher return elsewhere.[75]

Allowing freight railroads to cite opportunity costs as a basis for limiting their public service obligations potentially establishes a high economic hurdle for passenger train operators demanding access to freight railroad facilities. A freight railroad could claim that resources (such as track capacity) it would have to devote to passenger trains could achieve a higher return if used to expand freight service. This argument may be particularly powerful if there is no spare capacity.

Passenger Access in an Era of Tight Capacity

Since railroad deregulation in 1980, the supply and demand for freight railroad facilities has come closer to equilibrium. What Congress set out to achieve in the Transportation Act of 1920, consolidation and the shedding of excess capacity, has been largely achieved. Since 2004, the Surface Transportation Board has required each railroad to submit a plan each year describing how it intends to avoid capacity shortages during the grain harvest season. Many railroads have been investing heavily to increase capacity, including, in some cases, restoring sections of double track in locations where the second track had been removed many years ago.

The disappearance of excess capacity was related to the decline of passenger service. Supporting passenger train operations had led many railroads to install multiple tracks, yard bypasses, and sophisticated signaling systems. This infrastructure generated additional capacity by allowing trains of varying speeds to use the same rights of way. Without passenger trains, the freight

[74] *Commuter Rail: Information and Guidance Could Help Facilitate Commuter and Freight Rail Access Negotiations,* January 2004, GAO-04-240, p. 32.

[75] 1980 Annual Report of the ICC, p. 39 and *Abandonment of Railroad Lines—Use of Opportunity Costs,* 360 ICC 571, 1979.

railroads could shed much of this capacity and could also economize by maintaining tracks for freight-train speeds rather than for the higher speeds needed for competitive passenger service.[76]

Tighter supply of rail facilities has raised questions about the railroads' public obligations in such an environment. Under such conditions, what is a reasonable request for rail service? Does a railroad have an obligation to expand capacity in order to meet additional requests for service? As stated in one Supreme Court case, "the common law of old in requiring the carrier to receive all goods and passengers recognized that 'if his coach be full' he was not liable for failing to transport more than he could carry."[77] Without enough room to accommodate everyone, a carrier still must treat customers fairly, if not identically.[78]

What it means to treat customers fairly is complicated by the unique demands of passenger service. Passenger trains typically operate at higher speeds than freight trains, and railroads insist that a mix of speeds on the same track can actually reduce the number of trains that can be operated. Further, while some freight trains operate on tight schedules, many do not, and a passenger operator's insistence upon on-time performance may cause conflict with less time-sensitive freight operations.

Public Authorities Avoid Acquiring Common Carrier Status

An earlier section discussed how public authorities could acquire railroad rights of way that had been officially abandoned. Upon issuing a certificate of abandonment, the ICC (now the STB) no longer has jurisdiction over the right of way. Thus, if a public authority were to acquire an officially abandoned line, the STB (the ICC's successor) would not have jurisdiction over the authority because it would not be deemed a "rail carrier" as defined in statute, nor would the "common carrier obligation" (potentially requiring the authority to provide freight rail service upon reasonable request) be attached to the authority. However, if a state or local agency wished to acquire a non-abandoned rail line from a freight railroad willing to sell, the agency would acquire the status of a common carrier along with the obligation that this status entails.

In 1991, the ICC issued a ruling that has allowed public rail authorities to acquire active freight lines without acquiring the common carrier status, which has greatly facilitated public takeover of lines for passenger use. The ICC ruling involved a 16-mile rail segment owned by the Maine Central Railroad which the state of Maine wanted to purchase for use in a new passenger rail service. The transaction was structured so that the freight railroad retained a permanent, exclusive easement to carry freight over the line.[79] Thus, the freight railroad retained its common carrier obligation over the line, not encumbering the state of Maine with this obligation. This transaction has since served as precedent for numerous access transactions (more than 60 cases). It allows a state or local government to provide rail passenger service without acquiring the status of a common carrier.[80]

---

[76] Robert E. Gallamore, "Perspectives and Prospects for American Railroad Infrastructure," *Infrastructure,* Summer 1998, p. 36.

[77] *Pennsylvania Railroad v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915).

[78] *Pennsylvania Railroad. v. Puritan Coal Mining Co.*, 237 U.S. 133-34 (1915).

[79] 8 ICC 2d 835 (1991).

[80] For a recent example, see Massachusetts Dept. of Transportation—Acquisition Exemption—Certain Assets of CSX Transportation, STB Docket No. FD35312, May 3, 2010. CSX railroad is selling multiple segments of its track in and around Boston to commuter operators while retaining a freight easement. In the *State of Maine* decision, the ICC cited the city of Austin's purchase of a rail line as an example where the city assumed a common carrier obligation (even though it did not intend to operate the line itself) because it acquired full ownership of the line.

In these transactions, the STB has attempted to facilitate passenger use of the right of way while at the same time protecting the common carrier obligation attached to the line. The STB has allowed operating agreements between freight railroads and passenger operators to restrict freight operations to specific parts of the day and has allowed passenger operators to assume responsibility for maintenance and dispatching over lines also used for freight. However, the STB has disapproved of transactions in which the passenger operator would have gained so much control over the line that it could have thwarted enforcement of the common carrier obligation.

Separating the physical assets from an operating easement over a railroad line raises an important but unresolved question. Could a public authority forcibly acquire a mere passenger easement or some other partial condemnation of a freight line for the purposes of providing passenger service over the line? A freight railroad right of way could be wide enough that condemning only a portion of the right of way for adding parallel track would not interfere with freight operations. Similarly, acquiring an easement for only certain times of the day may not interfere with freight operations. In so doing, it is possible that this partial condemnation would not be judged by the courts/STB to interfere with interstate commerce and therefore permissible.[81]

Passenger Access via the Track-Sharing Provision

The Transportation Act of 1920 included a provision under which the ICC could require railroads to share terminal facilities including main-line track for a reasonable distance outside the terminal.[82] This provision has survived as current law, in amended form but with no substantive changes. It is currently codified at 49 U.S.C. 11102(a):

> The Board may require terminal facilities, including main-line tracks for a reasonable distance outside of a terminal, owned by a rail carrier providing transportation subject to the jurisdiction of the Board under this part, to be used by another rail carrier if the Board finds that use to be practicable and in the public interest without substantially impairing the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business. The rail carriers are responsible for establishing the conditions and compensation for use of the facilities. However, if the rail carriers cannot agree, the Board may establish conditions and compensation for use of the facilities under the principle controlling compensation in condemnation proceedings. The compensation shall be paid or adequately secured before a rail carrier may begin to use the facilities of another rail carrier under this section.

This provision has been a focus of competitive access disputes between railroads and some of their "singularly served" customers, but was not considered in the context of passenger access to freight facilities until the 1990s. In 1991, a Southern California commuter rail authority, citing this provision, appealed to the ICC to break an impasse between it and a freight railroad over its use of freight track.[83] In 1998, the provision was used again by commuter interests in the same region when unable to reach agreement with a freight railroad for use of its right of way.[84] In both cases, the commuter authorities eventually reached agreements with the freight railroads without ICC/STB intervention, so the legality of using this provision for access by passenger operators

[81] Kevin M. Sheys, "Strategies to Facilitate Acquisition and Use of Railroad Right of Way by Transit Providers," *Legal Research Digest, Transit Cooperative Research Program,* no. 1, September 1994.

[82] 41 Stat. 476, 477.

[83] ICC Finance Docket No. 31951 (1991).

[84] STB Finance Docket No. 33557 (1998).

has not been tested in court. One question is whether a public agency that is not yet engaged in rail transportation would qualify as "another rail carrier," as required in the statute.[85]

Congress Extinguishes Residual Local Regulation

Fifteen years after deregulating the transportation system, Congress abolished the ICC and replaced it with the STB in the ICC Termination Act of 1995 (ICCTA, P.L. 104-88, 109 Stat. 830). ICCTA kept in place the deregulatory framework of the Staggers Act. One modification made in ICCTA, however, has had a profound impact on a state's or municipality's prospects for gaining access to freight rights of way—perhaps shutting the door on the possibility except on terms acceptable to the freight railroad.

Prior to ICCTA, the federal government and the states had some concurrent jurisdiction over railroad rates, classifications, rules, and practices, and states and localities retained authority over the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks if the tracks were located, or intended to be located, entirely in one state. Under ICCTA, these aspects of rail regulation were placed under the exclusive jurisdiction of the STB.[86] As stated in the House report, this change was made "to reflect the direct and complete preemption of State economic regulation of railroads."[87]

This change consolidating jurisdiction under the federal government has been cited by the STB and the courts when blocking state or local government attempts to condemn portions of railroad rights-of-way for other public purposes. As discussed above, prior to ICCTA it may have been possible for local governments to condemn railroad property for some other public use if the second use would not materially interfere with railroad operations.[88] Court decisions in condemnation cases since ICCTA indicate this is no longer the case. For instance, a Wisconsin city, citing its authority under its police power, attempted to condemn a portion of a railroad's right of way used for passing track in order to straighten an unsafe curve in a road parallel to the railroad.[89] The court ruled that the city could not condemn the railroad property because condemnation would be a form of rail regulation, preempted by ICCTA. Similarly, the city of Lincoln, NE was unable to condemn a 20-foot-wide strip of railroad right of way for a distance of five blocks for use as a pedestrian and bike trail.[90] The railroad contended that it was using this property for loading and unloading lumber and that trail users would be too close to the tracks, creating a safety hazard. The STB sided with the railroad, finding the proposed taking would unduly interfere with interstate commerce. In another case, the city of St. Paul, MN, sought to condemn a 24-foot-wide strip of railroad right of way for about 2 miles for use as a bike trail.[91] A federal court held that the issue of potential interference with railroad operations was not even relevant because the condemnation action in and of itself triggered the ICCTA preemption.

[85] The potential legality of this provision from the perspective of passenger interests is discussed in Charles A. Spitulnik and Jamie Palter Rennert, "Use of Freight Rail Lines for Commuter Operations: Public Interest, Private Property," *Transportation Law Journal,* v. 26, 1999, pp. 319-339.

[86] Compare 49 U.S.C. 10501 and 49 U.S.C. 10907 before ICCTA with 49 U.S.C. 10501 after ICCTA.

[87] H.Rept. 104-311, 104th Congress, November 6, 1995, p. 95.

[88] Fritz R. Kahn, "Condemnation—An Alternative Means for Railroad Line Acquisitions," *Transportation Journal,* Fall 1993, v. 33, issue 1, p. 15.

[89] *Wisconsin Central Ltd. v. The City of Marshfield,* 160 F. Supp. 2d 1009 (2000).

[90] City of Lincoln—Petition for Declaratory Order, STB Finance Docket No. 34425, 2004 STB Lexis 508 (2004).

[91] *Soo Line Railroad Co. v. City of St. Paul,* 2010 U.S. Dist. LEXIS 59971 (2010).

These cases, at the turn of this century, could be viewed as the other bookend to the station stoppage cases at the turn of the last century. Recall that the prevailing argument for upholding community stoppage laws back then was that local governments, rather than a "distant authority," could "more wisely" and with "deeper concern" manage the rights of way in their jurisdictions.

The same ICCTA provision appears to block attempts by passenger carriers seeking to gain access to freight rights of way at a lower price through condemnation rather than paying a negotiated price. In 2006, the Chicago Transit Authority sought to condemn a 2.8 mile-long right of way over which it ran two tracks alongside the three tracks of the Union Pacific Railroad. The transit authority had leased the land from Union Pacific for 50 years. In negotiations over lease renewal, the parties were unable to reach an agreement on the rent, and when the freight railroad rejected the transit authority's proposal for a one-time payment, the transit authority began a condemnation proceeding. The court found that ICCTA preempted the condemnation proceeding, again because condemnation was a form of local regulation barred by the law.[92]

Options for Congress

From a freight railroad's perspective, an important distinction is whether allowing passenger trains would absorb otherwise idle capacity or would displace revenue freight trains. Freight railroads expect commuter rail authorities to pay for freight revenues foregone due to use of capacity for passenger service, and there is often disagreement over how severely the passenger operations compromise the railroad's ability to run additional freight trains.[93] Congress might consider whether the Federal Railroad Administration, experts in determining the infrastructure requirements for safe operation, could provide an independent assessment.

To passenger rail proponents, disputes over access to a limited track network are indicative of a lack of federal investment in this mode. Double tracking a rail network that is largely "stuck in a one-track world"[94] would be one, albeit an expensive, option for reducing conflicts between freight and passenger use of track. The transcontinental freight railroads have, in recent years, been adding parallel tracks on their busiest routes. Shorter-haul intermodal, refrigerated, and parcel cargoes are an incentive for freight railroads to provide "express" services, perhaps requiring additional parallel track along segments of their networks. Yet, one of their largest express customers, UPS, has voiced frustration with the slow pace of their investment, including their slow pace in adopting new technology, like positive train control, that could increase capacity.[95] Freight railroads and "higher"-speed intercity passenger operators (as opposed to "high-speed" trains operating on dedicated passenger track) could potentially share an interest in express track construction. One method that has been proposed as a public-private partnership in enhancing rail infrastructure is the creation of a federal rail trust fund, financed by taxes on the users of the system.[96]

[92] *Union Pacific Railroad Co. v. Chicago Transit Authority*, 647 F.3d 675 (2011).

[93] *Commuter Rail: Information and Guidance Could Help Facilitate Commuter and Freight Rail Access Negotiations,* January 2004, GAO-04-240, pp. 14-17.

[94] Jeremy Grant, "Ageing U.S. Rail Networks Stuck in a One-Track World," *Financial Times,* September 13, 2004.

[95] Testimony of Thomas F. Jansen, Vice President UPS, STB hearing, *Rail Capacity and Infrastructure Requirements,* Ex Parte No. 671, April 11, 2007.

[96] See for instance, H.R. 1617, 108th Congress.

UPS's rail service needs raise a fundamental question for Congress. Can the same rail network be expected to satisfy the needs of both shippers and passengers? UPS, like many shippers, requires a fluid rail network from coast to coast, with trains arriving reliably on time and in sync with its tightly "choreographed" logistics network. Is this possible if a transcontinental UPS train must be shunted to a siding every time it encounters an Amtrak train, or each time it approaches a city along the way during rush hour?[97]

Given the increasing demands on urban rail corridors, Congress may wish to consider alternatives for managing them. The "port authority" model might help manage some of the competing uses.[98] Similar to a seaport authority, a publicly owned "rail port authority" could purchase key rail corridors (many marine terminals were once owned by railroads) in order to rationalize, reconfigure, or otherwise improve a city's rail network for both passenger and freight use. While freight railroads can be expected to maximize use of their individual rights of way, as rivals they have little incentive to analyze an urban rail system as a whole or minimize conflicts with intersecting roadways. Similar to the municipal takeover of commuter services, publicly owned freight rail facilities would become eligible for a broader array of federal transportation funding programs. Public funding could help such authorities amass a level of capital that the private railroads are unable or unwilling to provide. Railroads using the facility would have to pay fees, which they may find agreeable because they avoid the need for large, upfront capital outlays.

A similar model has been used by the Alameda Corridor Transportation Authority in Southern California, which purchased and modernized a freight rail line linking the ports with inland terminals. Grade separating this 20-mile rail corridor through the city increased freight train speeds, eliminated grade crossing conflicts, and freed up capacity on three other rail lines through the city. The freight railroads pay fees to the authority to run trains over the corridor. While the Alameda Corridor is not used for passenger service, this type of structure could address the concern that implementing passenger service on one railroad's corridor could disrupt the competitive balance between competing freight carriers.

The option of gaining access via purchase of freight rights of way by a public rail authority returns the discussion to the price of that access. Thus, the fundamental issue is whether freight railroads and prospective passenger rail authorities should negotiate over the price of railroad property just as any private parties would or whether an independent, but governmental, third party, such as the STB, should have some role in determining the terms of sale. Some railroad rights of way have been purchased by passenger rail operators through normal market negotiations, and thus one could conclude that the marketplace is capable of determining their relative value, in terms of passenger or freight use. However, two aspects of these transactions make them different than the typical private property sale. For one, there is only one potential buyer and only one potential seller. Second, public authorities are not seeking access to railroad rights of way to use them for some non-rail public purpose, merely to use them for their intended purpose. Neither are public authorities asking the freight railroads to absorb the losses of operating passenger trains, as they once were required to. The risk of losses remains with the public. Given that a public service obligation is still attached to railroads, albeit largely lifted with respect to passenger service, do freight railroads have the right to solely set the price for passenger access or should the public's convenience and necessity be given some consideration?

[97] This problem is not unique to railroads. Truckers identify urban highway interchanges during rush hours as their most persistent bottlenecks.

[98] Federal Highway Administration, Office of Freight Management and Operations, *Freight Systems: From System Construction to System Optimization*, Working Paper, 2001.

A following question is who should be granted a legal right to insist upon use of freight track for passenger service? Congress might limit that right to Amtrak, as under present law, but could also extend it to agencies of state and local governments, such as transit authorities. Creating track access rights for potential private operators of rail service may be a particularly thorny issue. Congress has indicated a desire to promote private investment in intercity passenger rail service, but potential private competitors to Amtrak may expect the same privileged access to freight track that Amtrak enjoys.

Author Information

John Frittelli
Specialist in Transportation Policy

Acknowledgments

The author wishes to acknowledge the assistance of John Williamson, Information Research Specialist, in researching topics covered in this report.

Disclaimer